

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 04.09.2013

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Judgment delivered on:09.10.2013

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OMP 588/2010

GOVT. OF NCT OF DELHI

..... Petitioner

Versus

M/S GARG BUILDERS

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Ms Purnima Maheshwari, Advocate

For the Respondent: Mr Arun Kumar Gupta & Mr Achal Gupta, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,J

1. This is a petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 (in short the Act) to assail the award dated 23.07.2010 passed by the arbitrator. The arbitrator in this case was appointed by the Chief Engineer of the petitioner vide order dated 03.08.2007. The arbitrator appointed is a retired Chief Engineer of Central Public Works Department (CPWD).

2. The broad facts in the background of which the present petition has been filed are as follows:

2.1 The respondent vide Letter of Acceptance (LOA) dated 25.02.2003 was awarded the work which is described as follows: "Excavation of

Supplementary Drain up to DBL between RD 22580 to RD 23218m including lining with Hydraulically pressed CC tiles of size 300 x 300 x 50 mm on both side slopes of the drain” (hereinafter referred to in short the work).

2.2 The allocated time under the agreement was nine (9) months.

2.3 It is the stand of the petitioner that hindrance free site was made available to the respondent on 04.03.2003 and, therefore, the respondent had to execute the work on or before 03.12.2003. The total value of the work was pegged at Rs. 42,74,976/-.

2.4 Admittedly, time for executing the work was extended on several occasions. The stand of the petitioner was that the extension of time was provisional. According to the petitioner, time was extended between 31.01.2004 till 28.02.2006.

2.5 It is, though not disputed before me, by counsel for the petitioner that, on 07.05.2003 respondent informed the petitioner that there was impediment in the work being carried out as there was sludge found near the toilet block.

2.6 Despite, extension of time, according to the petitioner, the respondent stopped execution of work at site on 30.04.2004, and thereafter, abandoned the site on 24.04.2005.

2.7 Since the respondent, according to the petitioner, refused to carry on the work in issue, including additional/ extra work awarded to it on 18.11.2005, the petitioner rescinded the contract on 02.03.2006 by exercising its power under clause 3 of the General Conditions of the Contract (in short the GCC). The respondent, evidently, demanded current market rates for executing additional/ extra work, having regard to the fact that more than two years had passed since the contract was executed

between the parties. The petitioner on the other hand felt that such a demand was beyond the terms of the contract obtaining between the parties.

2.8 According to the petitioner final measurements of the work executed by the respondent, were carried out between 16.03.2006 to 17.05.2007.

2.9 Evidently, the respondent invoked arbitration and raised claims on the petitioner vide communication dated 24.04.2007.

3. As indicated at the very outset, an arbitrator was appointed by the petitioner, on 03.08.2007. The respondent filed his statement of claims on 15.11.2007. The petitioner filed its defence with the arbitrator on 18.01.2008. Notably, at this stage the petitioner had not raised any counter-claims. The appointing authority, i.e., the Chief Engineer, after more than eight (8) months, vide communication dated 26.09.2008 referred counter-claims of the petitioner to the learned arbitrator for adjudication, pursuant to which, the petitioner evidently filed its counter-claims with the arbitrator on 06.02.2009.

3.1 To be noted, as per the averment made in paragraph 2(H) of the petition, evidently, at the stage of the institution of the petition, the unexecuted work; which was awarded to another contractor, at the risk and cost of the respondent, was still in the process of execution.

4. The learned arbitrator after giving due opportunity to the parties proceeded to pass the award on 23.07.2010, which is impugned in the present proceedings.

5. Before the arbitrator, the respondent had raised sixteen (16) claims, whereas the petitioner, apart from refuting the claims of the respondent, preferred five (5) counter-claims. A perusal of the award would show that the learned arbitrator after appreciating the evidence on record has returned the following findings of fact:

(i) That time was not of the essence in the execution of the contract. Time was set at large during the course of execution of the contract.

(ii) The petitioner, though required to make available an unhindered site in terms of the Notice Inviting Tender (NIT)/ contract, at the stage of commencement of work itself, had failed to do so. The work was hindered due to narrowing of the reach of the drain due to existence of *sulabh sauchalaya* (toilet block) and an electric tower in the bed of the drain. The decision to shift the electric tower was taken, much after, the stipulated original tenure of the contract had expired. Similarly, the decision to execute extra work of constructing RCC retaining wall and catch water drain due to narrowing of the reach, was taken by the petitioner after, nearly two years of the expiry of the original time frame.

(iii) On account of the aforesaid reasons, the petitioner was in breach of its obligation under the contract from the very beginning and therefore, on account of such delays and breach of obligation, the respondent was entitled to compensation for loss occasioned due to extension of the period of contract.

(iv) The petitioner's stand in denying market rates to the respondent for construction of RCC retaining wall and catch water drain was wrong and, therefore, the decision to rescind the contract was also erroneous.

6. In the background of the aforesaid findings, the learned arbitrator vide his award gave the following decision in respect of each of the claims and counter claims preferred by the respondent and the petitioner :

RESPONDENT:

Claim Nos.	Particulars of the claim	Allowed fully / partially rejected	Amount claimed (Rs.)	Amount awarded (Rs.)

1	Refund of Security deposit	Allowed	3,11,000/-	3,11,000/-
2	On account of quantities withheld from final bills	Partially	8 lacs	Total gross Amount: 5,51,596/- (+ 86,675 + 4,07,274 + 57,648 less taxes) Net = 5,24,451/-
3	Expenses for barricading	Partially	1 lac	75,000/-
4	Construction of diversion channel	Partially	5 lac	3,75,375/-
5	Payment for excavation and disposal of rubbish, garbage and slush, etc.	Partially	17.50 lacs	10,63,545/-
6	Idle Labour, watchmen, munshi and staff	Partially	7.50 lacs	1,33,470/-
7	Idle Machinery	Partially	18.50 lacs	8 lacs
8	Dewatering and lowering of SSWL (sub-soil water level)	Partially	10 lacs	7,08,500/-
9	Pumping out surface water after monsoon of 2003	Rejected	4 lacs	Nil
10	Pumping of surface water caused by breach of bundis due to work on adjoining site of another agency	Partially	5 lacs	3.50 lacs
11	Waste water from inlets of right panel	Rejected	2 lacs	Nil
12	Objection to recoveries	Allowed	3.20 lacs	3.20 lacs

13	Towards damages due to submergence of pump sets, course sand, aggregates etc.	Rejected	10 lacs	Nil
14	Loss of profit vis-à-vis work withdrawn	Partially	2 lacs	1,07,260/-
15	Litigation cost	Partially	2 lacs	1 lac
16	Interest	Partially	At the rate of 18%	At the rate of 10% w.e.f. 24.07.2007, i.e., the date of invocation of the arbitration to the date of award. Future interest at the rate of 12% from the date of award to the date of payment, if the awarded amount is not paid within two months from the date of the award.

PETITIONER

Counter-Claim Nos.	Particulars of the claim	Allowed fully / partially / rejected	Amount claimed (Rs.)	Amount awarded (Rs.)
1	Execution of balance work at risk and cost of the respondent	Rejected	75,12,636/-	Nil
2	Filling of catch water drain unnecessarily	Partially	7,03,552/-	1 lac

	excavated by respondent			
3	Non-payment of electricity bill and non-submission of NOC from NDPL/ DESU	Partially	1 lac	12,530/-
4	Payment on account of rectification of damaged work executed through new contractor	Rejected	4,37,198.96	Nil
5	Litigation cost	Rejected	1 lac	Nil

7. Arguments on behalf of the petitioner were advanced by Ms Purnima Maheshwari, while those on behalf of the respondent were made by Mr Arun Kr. Gupta.

8. Ms Maheshwari, on behalf of the petitioner, made some general assertions as also certain specific submissions in support of her objections to claims of the respondent which were allowed and those of the petitioner which were disallowed.

8.1 The general submissions made by Ms Maheshwari were broadly as follows: that pursuant to the award of contract in favour of the respondent on 25.02.2003, a hindrance free site was handed over to the respondent on 04.03.2003. Due to failure of the respondent to complete the work within the stipulated period of nine (9) months, the period for execution of the contract was provisionally extended from time to time between 31.01.2004 till 28.02.2006.

8.2 Ms Maheshwari contended, that in exercise of power under clause 12 of the contract vide communication dated 18.11.2005, the respondent was directed, to execute additional/ extra work, which the petitioner unlawfully

refused to execute except upon payment of market rates. Admittedly, this stand was communicated by the respondent to the petitioner vide letter dated 13.12.2005.

8.3 Ms Maheshwari contended that the respondent after collecting payments of three running bills, left the site in April, 2005 when, the stage came about for submission of the final bill. The respondent, according to her, at that stage raised disputes and stopped work contrary to the provisions of the contract. It was Ms Maheshwari's contention that all payments till the third running bill have been made to the respondent as per measurements made and accepted by the respondent.

8.4 It was Ms Maheshwari's contention that failure on the part of the respondent to execute the work resulted in a situation whereby the petitioner was forced to rescind the contract, on 02.03.2006, in exercise of powers under clause 3 of the contract.

8.5 It was the contention of Ms Maheshwari that though the respondent had left the site in April, 2005, instead of raising the disputes immediately thereafter, the respondent waited for nearly two years to seek arbitration. Arbitration in the matter was sought on 24.04.2007. It was contended that the failure of the respondent to execute the work had resulted in the petitioner suffering heavy losses. Consequently, the petitioner was compelled to call for fresh tenders, both for rectification of the damaged work and for execution of the balance work, which the respondent had abandoned. The abandoned work was required to be completed at the risk and cost of the respondent, in terms of clause 3 of the contract.

8.6 Ms Maheshwari submitted that the learned arbitrator had allowed the claims of the respondent without regard to the terms and conditions of the

contract. Her specific submissions with respect to the claims, were briefly as follows:

(i) In respect of claim no.1, it was submitted that the respondent was responsible for the delays in the execution of the work. The contract was extended eight times, though provisionally, for reasons attributable to the respondent. The reasons being: the construction of diversion drain instead of bundis, delay in the provision of electric connection and the construction of a ramp for its own convenience on horticulture land.

(ii) In respect of claim no. 2, it is contended by Ms Maheshwari that the said claim has been allowed without regard to the measurements entered in the measurement book. Reliance was placed on clause 6 of the GCC in this behalf. Amounts awarded against the items of work under claim no. 2, have been generally refuted.

(iii) In so far as claim no. 3 is concerned, it was contended by Ms Maheshwari that no amounts ought to have been awarded by the learned arbitrator towards barricading as it was not an extra item. She submitted that it was a safety measure, and therefore, as per clause 8 of the Special/ Additional Terms and Conditions of the Contract (in short SCC), the respondent was liable for safety measures. It is contended that no proof or evidence was produced as regards labour, cost of construction or cost of maintenance.

(iv) As regards claim no. 4, Ms Maheshwari submitted that the learned arbitrator disregarded clause 1.3 of the SCC, which required the respondent to construct longitudinal and cross bundis. The diversion drain for which amounts had been awarded were constructed by the respondent for his own convenience. The result, according to Ms Maheshwari, was that, the

contractor removed the excavated earth and left the same unfilled which had to be filled up by the petitioner, as the respondent had abandoned the site.

(v) With respect to claim no. 5, Ms Maheshwari relied upon clause 2 of the SCC, which according to her required the respondent to inspect the site and, therefore, the claim under this head could not have been sustained by the learned arbitrator. It was Ms Maheshwari's submission that excavation and disposal of earth was covered under item 4 of the schedule of quantities. The royalty, according to her, for earth removed, had to be paid by the respondent, as per clause 19(3) of the SCC. According to the learned counsel after the lowering of the sub-soil water level, only earth was available which, the respondent removed, and for which purpose, the respondent had requested that a passage be made available to enable him to ply his truck through land belonging to the Delhi Development Authority (DDA). Once again it was contended that the amount awarded under this head was based on no documentary evidence, or otherwise, qua disposal of building garbage, rubbish and slush etc.

(vi) In so far as claim nos. 6, 7 & 8 were concerned, it was contended that the learned arbitrator had not based the amounts awarded on any evidence placed on record by the respondent, which could have been placed, such as, the log-book of the contractor and/or payment receipts issued by labourers or the entity from whom the machines / equipments had been hired. The general objections to these claims being allowed were that, the respondent was responsible for the hold ups, and therefore, the claims awarded were beyond the scope of the agreement.

(vii) As regards claim no.10, the learned counsel contended that the learned arbitrator allowed these claims without regard to clauses 11, 12 and 17(iv) of the SCC. It was submitted that the respondent had constructed

bundis which were of inadequate capacity and hence were unable to stop the flow of water from the adjoining work site. It was stated that as a matter of fact, the agency which was executing work on the adjoining site had a similar complaint against the respondent. Therefore, according to her, claims for de-watering because of back-flow caused from adjoining site on account of breaches in bundis, ought not to have been allowed.

(viii). With regard to claim No.12, Ms. Maheshwari submitted that this was a claim of the respondent directed towards recovery made by the petitioner vis-à-vis damages caused to it in the execution of the work accorded to the respondent. The petitioner was required to carry out renovation work and hence this claim of proposed recoveries ought not to have been set aside.

(ix) In respect of claim no. 14, Ms Maheshwari reiterated that because the respondent refused to execute the work and requested for fore-closure of the agreement which led to its termination, no amounts could have been awarded with respect to loss of profit vis-a-vis the balance work.

(x) As regards claim nos. 15 and 16, learned counsel submitted that neither cost nor interest ought to have been awarded by the arbitrator. It was her submission that since the respondent had not completed the assigned work, costs were unjustified. As regards interest it was submitted that the matter was reserved for pronouncement of award by the learned arbitrator on 26.12.2009, which was delivered only on 23.07.2010, that is, after a period of nearly seven months, and therefore, the petitioner could not have been called upon to bear the interest for the said period. Ms Maheshwari submitted that out of the seven months taken by the learned arbitrator to deliver the award if the period of three months is excluded which could be taken as the normal period for delivering an award then, interest for the

remaining four months, ought not to be granted as it would amount to burdening the petitioner with interest, without it being at fault.

(xi) In respect of counter claim no. 1, Ms Maheshwari submitted that since the balance work was executed at the risk and cost of the respondent, the learned arbitrator, wrongly disallowed the petitioner's claim. According to Ms Maheshwari the cost of the work which remained unattended, at DSR of 1997, worked out to a figure of Rs. 23,75,430/-, whereas the lowest tendered cost qua the said work was Rs. 86,46,285/-; thus the escalation in cost was in the range of 263.99%.

(xi.1) As per the counsel, the respondent was liable to pay a sum of Rs. 74,14,922/-; which was a difference between the tendered cost of Rs. 86,46,285/- less the cost of unexecuted work as per rates quoted by the respondent, i.e., a sum of Rs. 12,31,363/-. In addition, according to the learned counsel, the petitioner was entitled to a sum of Rs. 97,714/- towards cost of publication of tender etc.

(xii) As regards counter claim no.2, Ms Maheshwari submitted that the respondent had left the catch water drain unfilled and, therefore, the necessary corrective action had to be taken by the petitioner since the respondent did not leave any excavated earth at site. For this purpose, the petitioner had to award a contract for filling up the catch water drain by having the earth carted from the Najafgarh drain. The learned arbitrator, therefore, according to the counsel, should have awarded the expenses incurred in that behalf.

(xiii) As regards counter claim no.3, learned counsel submitted that, under clause 13 of the SCC it was the sole responsibility of the respondent to ensure availability of electricity at site, therefore, it was liable not only in respect of connection charges but also for payment of charges towards

consumption. As per the learned counsel, the petitioner, in order to facilitate the work at site, obtained electrical connection, though it was the responsibility of the respondent. It was submitted that in July, 2004 a provisional bill in the sum of Rs. 12,350/- was received, and that, the respondent was required to submit copies of paid bills; an exercise which had not been done, to date. Due to non-payment, the pending bill increased to the extent of the amount demanded.

(xiv) As regards counter claim no. 4, Ms Maheshwari submitted that, since the work executed had defects, not only recoveries had to be made but the same had also to be rectified. For this purpose, a new contractor was engaged. The arbitrator, according to the learned counsel, erroneously rejected both the recoveries made of a sum of Rs. 3,20,055.80/- (which was intimated to the respondent vide letter dated 25.08.2006) as also the sums incurred towards extra expenditure, amounting to Rs. 1,17,143.16/-.

(xv) Lastly, as regards counter claim no. 5, which related to claim for litigation expenses, the learned counsel submitted that the same ought to have been allowed having regard to the submissions made hereinabove that the respondent was in breach of his obligations under the contract; a circumstance which led to its termination.

9. Mr Gupta, on behalf of the respondent, on his part broadly relied upon the findings returned by the learned arbitrator. He submitted that the objections filed by the petitioner were beyond the scope of provisions of Section 34 of the Act. It was Mr Gupta's assertion that since, none of the findings returned by the arbitrator were either patently illegal or beyond the terms of the contract or even against public policy, this court ought not to interdict the award at the behest of the petitioner. He reiterated that, it was not within the jurisdiction of this court to re-appreciate the evidence, and if

two views were plausible qua a claim, the finding returned by the learned arbitrator, would have to be sustained.

9.1 It was the contention of the learned counsel that the respondent had completed 78% of the work and, as the site for execution of the work was impeded, the work on the remaining length of the drain, equivalent to 115 square metres, could not be completed. The petitioner, despite being told over a period of two years after the expiry of the original time frame to clear the site of impediments, was unable to make a hindrance free site available to the respondent. Specific reliance was placed on the letter dated 18.7.2005 (Ex. C-86) and letter dated 18.11.2005 (Ex. C-54).

9.2 In so far as counter claims were concerned, Mr Gupta submitted that the learned arbitrator having returned a finding of fact that the petitioner was in breach of contract from the very beginning, there was no case for grant of amounts towards risk and cost. Mr Gupta, specifically relied upon the judgment of this court in *Batra Construction Company vs DDA 1999 (1) AD (Delhi) 67* to buttress his submission that risk and cost, if at all, could have been awarded only at the point in time when the work was rescinded and not two years after that date.

9.3 As regards the counter claim of the petitioner for filling up of catch water drain, Mr Gupta submitted that not only were the expenses claimed, exorbitantly high, but no notice was issued to the respondent that the said work was done at his risk and cost. Mr Gupta emphasised that the learned arbitrator had found that the excavated earth was available on the banks of the catch water drain, and had hence, awarded accordingly, a sum of Rs. 1 lac in favour of the petitioner. With regard to electricity dues, Mr Gupta submitted that the learned arbitrator had correctly awarded an amount of Rs.

12,530/-, which were the dues payable, if payment, was made by the due date i.e., 08.07.2009, as per BSES.

9.4 In so far as counter claim no. 4 was concerned, Mr Gupta said that the respondent was forced to abandon the work in April, 2004, and that, even when measurements were taken on 07.04.2006; which was after two years of the respondent having left the work, there were no defects found in the work executed by the respondent. The invitation given by the petitioner vide letter dated 17.05.2007, for conducting final measurement of the work executed by the respondent was declined by the respondent vide letter dated 25.5.2007 as no steps had been taken by the petitioner to first clear the silt. Since, the petitioner failed to take care of the work executed by the respondent, the respondent could not be held liable for damages.

9.5 As regards counter claim no. 5 Mr Gupta said that, since, the learned arbitrator had returned findings to the effect that found that the petitioner was in breach for its obligation and had retained legitimate dues of the respondent, the cost awarded in the respondent's favour ought to be sustained.

9.6 In support of the various submissions made above, Mr Gupta relied upon the following judgments: *Delhi Jal Board vs. M/s. Subhash Pipes Ltd. 2005(1) RAJ 495 (Del)*; *P.M. Paul Vs. Union of India 1989 Suppl. (1) SCC 368*; *K.N. Sathyapalan Vs. State of Kerala (2007) 13 SCC 43*; *J.G. Engineers Pvt. Ltd. vs. Union of India, (2011) 5 SCC 758*; *Deconar Services Pvt. Ltd. Vs. National Thermal Power Corporation Ltd., 2010 (I) AD (Delhi) 468*; *Union of India vs. M/s. Alfa Laval (India) Ltd. 2006(3) RAJ 347 (Del)* and *Vakil Chand Bindal Vs. Delhi Development Authority, 1999 (3) RAJ 566 (Del.)*

REASONS

10. Having heard the learned counsels for the parties and perused the record, according to me, what clearly emerges from the record is that:

- (i) The respondent was awarded the work in issue by virtue of LOA dated 25.02.2003. The time allocated under the contract was a period of nine (9) months.
- (ii) The petitioner admitted that it could provide hindrance free site only on 04.03.2003, therefore, according to the petitioner, work had to be executed on or before 03.12.2003.
- (iii) The total value of the work was Rs. 42,74,976/-, out of which the respondent executed work worth Rs. 31 lacs (approx).
- (iv) The stand of the petitioner is that the respondent stopped execution of work at site on 30.04.2004 and thereafter abandoned the site on 24.04.2005.
- (v) The respondent was offered additional/ extra work on 18.11.2005; the respondent refused to execute additional/ extra work except on payment of market rates as more than two years had passed since the original time period provided under the contract expired.
- (vi) Extensions were granted from time to time. Even according to the petitioner extensions were granted eight times, though provisionally.
- (vii) Final measurements were taken by the petitioner;
- (viii) The job of rectification of the work carried out by the respondent and to complete unexecuted work, was outsourced to a third party.
- (ix) At the stage of institution of the present petition, the work awarded by the petitioner to a third party at the risk and cost of the respondent, was still under process of execution. This work was awarded to a third party nearly

two years after the determination of the contract. The contract was rescinded by the petitioner on 02.03.2006.

11. In the light of the aforesaid facts, the learned arbitrator concluded that time ceased to be the essence of the contract and consequently was set at large. He returned a finding of fact that work of constructing a supplementary drain was hindered due to the narrowing of the breach. The narrowing of the breach was hampered by existence of a *sulabh sauchalaya* (toilet block) and an electric tower in the bed of the drain. He also returned a finding that the electric tower was shifted after the original tenure of the contract had expired and that a decision was taken to construct a RCC retaining wall and catch water drain due to the narrowing of reach, albeit after two years of the expiry of the original time frame. These being findings of fact, none of which were disputed before me, therefore, as quite correctly found by the learned arbitrator, the petitioner was responsible for the delay in the execution of the contract. Having found so, the learned arbitrator proceeded to examine each of the claims. I do not find any error in these findings returned by the learned arbitrator. In any case these are findings of fact and under Section 34 of the Act, this court cannot re-appreciate the evidence, unless it is shown to the court that findings reached are perverse or are based on no evidence at all. What, therefore, requires examination is whether claims, in respect of which the learned arbitrator has awarded amounts, conform to the provisions of contract and are based on some material/ evidence (the adequacy of which not being subject matter of court's jurisdiction).

12. In so far as claim no. 1 is concerned, this is for refund of security deposit. In my opinion the court having found the petitioner guilty of breach of its obligation under the contract for providing a hindrance free site, the

said amount has been rightly awarded in favour of the respondent. Ms Maheshwari's contention that the respondent refused to execute the additional/ extra work, which is what led to the rescission of the contract on 02.03.2006 is unsustainable in view of stand of the respondent that he would execute the additional/ extra work only if the market rate is paid; the fact of the matter is that the original time frame, even according to the petitioner, expired on 03.12.2003 and the additional/ extra work was offered on 18.11.2005. The respondent communicated his stand on 13.12.2005. The stand of the respondent was reasonable and justified, which is accepted by the learned arbitrator. I find no reason to differ with the same.

13. As regards claim no. 2 there are six items, detailed out in the agreement, being item nos. 2, 8, 8(a) and 9 and two extra items being item nos. 2 and 3, in respect of which the arbitrator notes that there is no dispute and they were accounted for by the petitioner in the final bill. In respect of these items a sum of Rs. 86,675/- is awarded. Nothing was shown to me by Ms Maheshwari that this finding was erroneous or that a dispute had been raised with respect to the said six items. Accordingly, this claim as regards the said items would have to be sustained.

13.1 The remaining items in the agreement qua which there is a discussion by the arbitrator, i.e., item nos. 1, 4, 10(i), 10(ii), 10(iii), 11 and 12. Item no. 1 is rejected by the arbitrator. Therefore, obviously there was no challenge to the same.

13.2 In so far as item no. 4 is concerned, it was contended by Ms Maheshwari that there were joint measurements which were entered into the measurement book, according to which the respondent had agreed to adjustment of royalty towards earth excavated at site. The rate at which the royalty was to be paid, was a sum of Rs. 10.50 per cum. The quantities in

respect of which adjustments were made, according to Ms Maheshwari were, 12029.09 cum, 20237 cum and 38788.50 cum. To be noted, if the product of the quantities and the rate is taken into account, the adjustments made from the running bills were of the following three sums: Rs. 1,26,305.45; Rs 2,12,488.50 and Rs. 4,07,279.25/- respectively. The arbitrator has, however, awarded refund of only a sum of Rs. 4,07,274/- against removal of 38788 cum of earth, after appreciation of evidence placed before him. The respondent had claimed that the excavated earth was not available for general use as it comprised of rubbish, garbage and slush etc. The petitioner, on the other hand, claimed that the respondent ought to have known the strata of earth existing at site, in view of the fact that the respondent was expected to be familiar with the strata as per the conditions of the contract. The learned arbitrator, in my view, rightly rejected this argument on the ground that it was not possible for the respondent to know the strata below the surface as it was covered by water and/or slush. In view of this, and the evidence produced before the arbitrator, in the form of communications (Exhibits C-4 dated 07.05.2003, C-7 dated 10.06.2003, C-8 dated 14.08.2003, C-16 dated 12.02.2004 and C-31 dated 30.05.2004) addressed by the respondent from time to time on the subject to the petitioner, he came to the conclusion that payment of royalty for excavation of building, rubbish, garbage and slush could not be taken as being included in the agreement item. Therefore, the arbitrator directed refund of Rs. 4,07,274/-. In my view, no fault can be found with the approach adopted by the arbitrator.

13.3 As regards the remaining agreement items, i.e., item nos. 10(i), 10(ii), 10(iii), 11 and 12, no challenge was laid by Ms Maheshwari. The aggregate

amount awarded qua these items by the arbitrator was a sum of Rs. 57,648/- only.

14. Against claim no. 3 the arbitrator has awarded a sum of Rs. 75,000/- to the respondent against a claim of Rs. 1 lac. The claim is with respect to expenses incurred apparently by the respondent for barricading the site as the safety measure and maintenance of the barricading between the period May, 2003 to March, 2005. The respondent claimed that since he had asked for fore-closure of the contract vide its letter of 30.04.2004, he was called upon to unnecessarily bear the expenses of maintenance of barricading. Ms Maheshwari argued that the arbitrator allowed the claim contrary to clauses 2 and 8 of the SCC, which required the respondent to take all safety measures for satisfactory execution of the work. The arbitrator while rejecting the claim for maintenance of the barricading, on the ground that no labour was exclusively detailed and maintained, allowed the claim to the extent of Rs 75,000/- based on details given in Exhibit C-73. The arbitrator appears to have taken the view that clause 8 of SCC would not apply, as it related to safety precautions which the respondent had to take qua workers etc. and, therefore, expenses incurred towards barricading were required to be compensated as an expense incurred towards extra item.

15. In my view, a bare reading of clause 8 of the SCC would show that it is not confined to safety measures, which were required to be taken only qua the workers at site. Clause 8 of the SCC also made the respondent responsible for any mishap or theft that may occur during the execution of the work. For the sake of convenience clause 8 of the SCC is extracted hereinbelow:

“8. The contractor shall take all the safety measures required for satisfactory execution of work, and he shall also be responsible for any mishap or theft that may occur during the

execution of work. The Department or its employees shall in no way be responsible for any such accident/ liabilities.”

15.1 Furthermore, I find that there is no evidence whatsoever placed on record, in support of the claim. It is not known, on what basis the arbitrator has awarded 3/4th of the claim made qua compensation of barricading. The award in respect of this claim is thus reversed.

16. With respect to claim no. 4 the arbitrator has awarded a sum of Rs. 3,75,375/- for construction of a diversion channel to divert flow of water in the main drain and for discharge of sub-soil water from the work area, against a claim of Rs. 5 lacs. The arbitrator has noticed that the construction of the diversion channel was in the knowledge of the petitioner. Reference in this regard had been made to the petitioner’s letter dated 19.04.2003 (Exhibit C-2). Furthermore, the arbitrator has held that in view of the weak strata in the supplementary drain, it became necessary to substitute the bundis with the diversion channel. Against the quantum of work executed in that behalf, the arbitrator has applied DSR, 1997.

16.1 Ms Maheshwari, however, contended that as per clause 1.3 of SCC, the respondent was required to construct longitudinal earthen bundis. The fact that the respondent had constructed a diversion channel, would not entitle him to any payment as the same was not done by him, for his own convenience.

16.2 The submission of Ms Maheshwari is untenable. If the state of the site, during the execution of the work, demonstrated the fact that bundis were neither stable nor workable, due to the drain bed being slushy on account of water, then surely the respondent was tasked with the job of executing the work at site and was entitled to take recourse to the next best approach after keeping the petitioner in picture. It was not Ms

Maheshwari's submission that the petitioner was unaware of the fact that a diversion channel was being constructed by the respondent. That being so, the respondent was entitled for work done on the principle of quantum meruit. The arbitrator has, therefore, in my opinion, committed no error in that behalf. To be noted, no dispute was raised by the petitioner with regard to the quantum of work executed or the rate applied by the learned arbitrator.

17. As regards claim nos. 5, 6, 7 & 8 are concerned, in my view, a perusal of the award qua these claims would show that the learned arbitrator has gone by some details submitted by the respondent without calling upon the respondent to at least support the details filed with some material on record. I find that in each of these claims, the learned arbitrator has awarded amounts without adverting to any material on record to support the amounts awarded against each of these claims.

17.1 In this behalf, let me first advert to claim no. 5. At a point in time, when reference was sought by the respondent, he had claimed an amount of Rs. 1.75 lacs. Accordingly, the said claim was referred by the Chief Engineer of the petitioner to the arbitrator. At the time of filing the statement of claims, before the learned arbitrator, this amount was enhanced to Rs. 17.50 lacs. This was objected to by the petitioner. The arbitrator overruled the objection and accepted the plea of the respondent that it was a typographical error.

17.2 Claim no. 5 essentially relates to payments sought by the respondent for excavation and disposal of building, rubbish, garbage, slush etc. The arbitrator has noted that the respondent wrote a large number of letters in that behalf to the petitioner, which were "mostly" not refuted. The arbitrator also notes that against a total excavated quantity of 84,988 cum, a claim for

a quantity of 14,700 cum was reasonable. Therefore, applying DSR of 1997, the arbitrator awarded a sum of Rs. 10,63,545/- to the respondent. There is no discussion in the award as to how the arbitrator has arrived to the quantity of 14,700 cum of “building rubbish and garbage” except having regard to calculations adverted to in Exhibit C-75 submitted by the respondent. It appears that the learned arbitrator has virtually accepted as gospel truth, the quantities claimed by the respondent of the rubbish and garbage removed by him.

17.3 Similarly, for idle labour/ staff, which include two supervisors and six watchmen, under claim no. 6, a sum of Rs. 1,33,470/- has been awarded by the arbitrator against an amount of Rs. 7.50 lacs claimed by the respondent; for idle machinery, a sum of Rs. 8 lacs has been awarded against a sum of Rs. 18.50 lacs claimed; and lastly, a sum of Rs. 7,08,500/- was awarded towards expenses purportedly incurred by the respondent for running and operating gen-sets and pumps. In each of these claims, the learned arbitrator has accepted the details furnished in the form of exhibits by the respondent. In support of claim no. 6, the exhibit relied upon is C-76, with regard to claim no. 7 the exhibit relied upon is C-77; and lastly, with regard to claim no.8, the exhibit relied upon is C-78. As correctly argued by Ms Maheshwari, that there was no evidence placed before the learned arbitrator as regards the labour/staff register maintained at site, the details of hire charges awarded at the rate of Rs. 2 lacs per month as against the claim of Rs. 3.60 lacs per month, against machinery which was apparently rented out by the respondent. Pertinently, Exhibit C-77, which contained calculations with regard to the claim referred to the following machineries: excavator (Tata Hitachi-200), JCB, and Tractor. As indicated above, the cumulative rent for these machineries which the respondent apparently paid was at the

rate of Rs. 3.60 lacs per month. The idle period claimed by the respondent was 155 days, though the arbitrator reduced that to four months. The learned arbitrator, on some *ipse dixit* has reduced the rental charges to Rs. 2 lacs per month and multiplied that with “*effective idle period*” of four months to arrive at the awarded amount of Rs. 8 lacs. There is no reference to any evidence whatsoever with regard to the payment of rental charges by the respondent.

17.4 The position is no different vis-à-vis claim no. 8, whereby cost of running and operating gen-sets and pumps was claimed. The total amount claimed under this head was a sum of Rs. 10,64,566/-. This included amounts towards hire charges at the rate of Rs. 12,500/- per month for each of three gen-sets, apparently, operated by the respondent, cost of diesel consumed at the rate of 6 litres per hour, expenses on consumables such as grease and mobil oil and, lastly, amounts paid to operators, fore-man and staff for running pumps. Once again, no material was placed on record to support any of these amounts referred to above. The learned arbitrator by employing a measure, which was not related to any evidence on record, as none was placed, reduced the cost of running and operating generator sets and pumps from the claimed amount of Rs. 9,766 per day to Rs. 6,500 per day, while keeping intact the idle period claimed by the respondent of 109 days.

18. Mr Gupta, in defence of each of these claims, took the stand that there was no dispute raised with regard to these claims by the petitioner. It was thus contended that none of these claims required proof.

19. In my view, what the arbitrator has done is simply recorded his conclusions by adopting the details given in the form of exhibits by the respondent. There are no reasons for awarding amounts under any of these

claims. Reasons, as is often stated, are a link between the material on record and the conclusion arrived at by an adjudicating authority. [See *Union of India vs Mohan Lal Capoor (1973) 2 SCC 836*]. An arbitrator, under the Act, is bound to give reasons unless the parties have agreed that no reasons are required or the award is one which is an arbitral award on agreed terms passed under Section 30 of the Act. This is clear on a bare perusal of sub-Section (3) of Section 31 of the Act. While an arbitrator is not expected to give “elaborate”, “detailed” reasons, in support of his findings, merely noting submissions without reference to any evidence on record, will render the award flawed. As indicated by me in the beginning of the judgment, adequacy of reasons may not be a ground for interference by this court under Section 34 or the manner of appreciation of evidence, but complete lack of evidence, in support of the conclusions, would certainly be a ground for interference. [See observations of the Supreme Court in *Som Datt Builders Ltd. vs State of Kerala (2009) 10 SCC 259*].

20. In so far as the argument of Mr Gupta is concerned, that there is no denial of the claims raised, in my view, is an argument which is completely contrary to the record. I have examined the defence filed. Against each of the claims, i.e., claim nos. 5 to 8, a defence on merits has been set up. The arbitrator has not discussed the defence of the petitioner. As a matter of fact, as indicated above, the details submitted by the respondent in the form of exhibits, has been accepted quite curiously, contrary to all canons of law. The Supreme court has repeatedly indicated that patent illegality can be a ground for interference by the arbitrator. A complete lack of evidence in respect of these claims, which the respondent did not prove, in my opinion calls for interference. [See observations of the Supreme Court in *Steel Authority of India Ltd. vs Gupta Brother Steel Tubes Ltd.. (2009) 10 SCC*

63 at page 79 in paragraph 18(iv)]. Therefore, the amounts awarded against claim nos. 5 to 8 are set aside. It will, however, be open to the respondent to seek a decision in respect of these claims based on the material, if any, which is already placed on record.

21. As regards claim no. 10 a sum of Rs. 3.50 lacs has been awarded in favour of the respondent against an amount of Rs. 5 lacs claimed by him. The amount is claimed on account of expenses incurred on pumping out surface water caused due to breach of bundis due to work being carried out, by another agency, in an adjoining work site. Ms Maheshwari has resisted the claim on the ground that the claim has been allowed by the learned arbitrator without regard to clauses 11, 12 and 17 (iv) of the SCC. Ms Maheshwari contended that since the bundis erected by the respondent were of inadequate capacity, there was a breach, which caused flooding. It was her case that the agency carrying on work at the adjoining site had a similar complaint. Ms Maheshwari submitted that the clauses of the SCC referred by her, stipulated that no extra amounts would be paid on account of damage, if any, caused by flow of water into the drain from any source whatsoever.

22. The learned arbitrator appears to have taken no cognizance of the aforementioned clauses of the SCC. The learned arbitrator while returning a finding of fact that back flow was caused because of breach of bundis, and therefore, flooding of the work site, which required de-watering did not make any observation as to whether or not the breach was caused because of inadequacy of bundis. It may be noted though in the statement of defence filed before the arbitrator, there is no specific reference to the aforesaid clauses referred to by Ms Maheshwari, except in letter dated 17.12.2003 (Exhibit C-13). The defence though taken by the petitioner was that the

breach was caused due to negligence of the respondent and that the respondent had been making these, “lame excuses” only to delay the execution of work.

23. In my opinion, once again the learned arbitrator has awarded a sum of Rs. 3.50 lacs against this claim without returning a finding as to whether or not the breach in the bundis occurred on account of inadequate bundis put up by the respondent to prevent water seeping in from the adjoining work site. Accordingly, the said claim will also have to be set aside and remitted to the arbitrator for returning a finding in that behalf, based on the material already on record. The arbitrator, if approached in accordance with law, will pass a fresh award qua the claims in issue (See *Cybernetics Network Pvt. Ltd. vs Bisquare Technologies Pvt. Ltd.*, 188 (2012) DLT 172).

23.1 I must also note that clause 17(iv) of the SCC on which reliance was placed by Ms. Maheshwari adverts to damage caused due to flow of water on account of monsoon. In this particular case, the respondent had claimed losses on account of damage caused due to water flooding into the respondent’s work site on account of work being carried out by another agency in an adjoining area. Therefore, as indicated above, it was pertinent for the arbitrator to return the material finding as to whether the breach was caused due to inadequacy of bundis put up by the respondent or otherwise before awarding the claim in favour of the respondent.

24. In respect of claim no. 12, the learned arbitrator ruled in favour of the respondent by holding that no recoveries could be made on account of damage to the work executed by him, which, according to the petitioner, had to be rectified. The petitioner, as a matter of fact, qua rectification by way of a counter-claim had demanded a sum of Rs. 4,37,198.96. The learned arbitrator ruled in favour of the respondent, as indicated above, with regard

to recoveries and also denied the counter-claim of the petitioner, (being counter claim no.4), towards cost of rectification, in respect of work executed through another agency.

24.1 The learned arbitrator returned a finding of fact that there was no defect found in the work executed by the respondent and at a point in time when it was finally measured by the petitioner, i.e., on 07.04.2006, nearly two years had elapsed since the respondent had left the work site. To be noted, even according to the petitioner the respondent had left the work site in April, 2004.

24.2 Ms Maheshwari's submission that since expenses had been incurred to rectify the work executed by the petitioner, amounts ought to have been paid cannot be accepted as there was no evidence before the learned arbitrator that the defect in the work executed by the respondent obtained on the date when he left the site. The challenge qua this claim is, accordingly, rejected.

25. As regards claim no.14, the learned Arbitrator has awarded a sum of Rs.1,07,260/- against a sum of Rs.2 Lac claimed towards loss of profit. This amount was claimed by the respondent in connection with the balance work which was withdrawn by the respondent. The learned arbitrator has come to this figure by applying a rule of thumb that if the work was executed by the respondent, it would have earned profit at the rate of 10% on the value of executed portion of the work. The Arbitrator notes in the award that the tendered amount of the work in issue was a sum of Rs.42,94,976/- against which a final bill was generated for a value of Rs.32,22,372/-, thus leaving a balance work of a value of Rs.10,72,604/-. It was 10% of this amount which was awarded as loss of profit. The learned arbitrator justifies the payment of this amount in view of his finding that the contract was wrongfully

terminated by the petitioner. In my opinion, this claim was wrongfully awarded. This is for the reason that the arbitrator while returning a finding that the petitioner was responsible for the delay caused in the execution of the contract, has also held that the respondent had rightly taken the stand of refusing to execute the work unless market rates were paid for the balance work. In other words, the arbitrator upheld the stand taken by the respondent that if he was to execute the balance work at rates less than market rates, he would suffer a loss. The respondent's stand of reducing his losses was sustained. The respondent as a matter of fact admittedly stopped working at site from 30.04.2004 and left the site by 24.04.2005. The measure adopted in the facts and circumstances of this case was clearly erroneous. Proof of loss of profit and measure are two different aspects. [See *M/s A T Brij Paul Singh vs State of Gujarat (1984) 4 SCC 59* in paragraphs 9 & 10 at pages 63-64].

25.1 Apart from the above, the claim is based on reduction in value of the contract. Therefore, the respondent would have to plead and establish that, had he received the truncated value of the contract, he would have utilized the same and earned a profit. The observations of the Supreme Court in *Bharat Coking Coal Ltd. vs L.K. Ahuja (2004) 5 SCC 109* in paragraph 24 at page 118 being relevant are extracted hereinbelow:

“....24. It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record.

In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in *Sunley (B) & Co. Ltd. v. Cunard White Star Ltd.* [(1940) 1 KB 740 : (1940) 2 All ER 97 (CA)] by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs 6,00,000 awarded to the claimant.....”

25.2 Therefore, amount towards loss of profit ought not to have been granted.

COUNTER CLAIM NO.1

26. In respect of counter claim no.1, the petitioner claimed a sum of Rs.75,12,636/-. The said counter claim was rejected by the arbitrator. It was Ms. Maheshwari's contention that since work was awarded to another agency at the risk and cost of the respondent, this amount ought to have been awarded in favour of the petitioner. The learned Arbitrator while rejecting this claim took note of the fact that he had found as a matter of fact that it was the petitioner which had breached the obligations under the contract causing loss to the respondent.

26.1 Before me, Mr. Gupta had also contended that the balance work was awarded to another agency supposedly at the risk and cost of the respondent on 29.03.2008 two years after the termination of the contract by the petitioner and more than four years after the completion of the original tenure of the contract.

26.2 Mr. Gupta also brought to my notice the fact that initially the petitioner while filing its statement of defence before the learned arbitrator on 18.01.2008 did not incorporate any counter claim. The Chief Engineer of the petitioner referred the counter claims for the first time for consideration by the arbitrator on 26.09.2008. It was only thereafter on 06.02.2009, that counter claims were raised by the petitioner before the arbitrator. Mr.Gupta

relied upon the judgment of this court in *Batra Construction Company vs. DDA* to contend that the quantification of damages by invoking the risk and purchase clause would only be awarded if immediate action is taken in that behalf. The delay of two years was fatal to the counter claim. Quantification of damages had to be done keeping in mind the rates for the new contract obtaining on the date when the petitioner rescinded its contract with the respondent. I am of the opinion that the learned arbitrator has reached the correct conclusion. As noticed by me in my narration of facts hereinabove, the new contract was in the process of execution even at the stage at which the present petition was filed. The arbitrator having reached a finding of fact that the petitioner was in breach of its obligations under the contract, this claim could not have been awarded in favour of the petitioner.

COUNTER CLAIM NO.2

27. Under this head, the petitioner had sought reimbursement of expenses paid by it to another agency by the name of M/s. Raj Construction for filling up the catch water drain. The petitioner claimed a sum of Rs.7,03,552/-. The arbitrator has awarded a sum of Rs.1 Lakh. The arbitrator does not disclose the basis for refusing the balance amount. The arbitrator has observed that construction of catch water drain was necessary. He further goes on to hold that the petitioner ought to have given a NIT for refilling work to the respondent, thereby affording opportunity to verify the work being done at site. Lastly, the arbitrator also observed that the excavated earth was dumped on the banks of the catch water drain, therefore, refilling work became easy. In this respect, the arbitrator has accepted the assertion of the respondent.

27.1 Having regard to the observations made by the arbitrator, it is quite clear that he has accepted the fact that the catch water drain required

refilling and that dumped earth lay on the banks of the catch water drain. The only question before him was with regard to the quantification of expenses, if any, incurred by the petitioner in that behalf. As indicated above, the petitioner claimed a sum of Rs.7,03,552/-, it provided the requisite material in the form of particulars of the agency and the amount charged by the said agency. The arbitrator was, therefore, in my opinion required to clearly return a finding as to why the claim had been reduced from Rs.7,03,552/- to Rs.1 Lakh. The rejection of this counter claim by the arbitrator is clearly erroneous. The decision of the arbitrator in that regard is therefore, set aside. The claim is remitted to the learned Arbitrator. The learned Arbitrator shall pass a fresh order vis-à-vis the claim in issue, if approached in accordance with law, based on material already on record.

COUNTER CLAIM NO.3

28. In respect of counter claim no.3, the arbitrator has awarded an amount of Rs.12,530/- as per the amount indicated in the electricity bill placed before him. Ms. Maheshwari submitted that as per the terms of the contract electric connection had to be obtained by the respondent. She further submitted that the concerned electricity company had provided, in July, 2004, a provisional bill in the sum of Rs.12,350/-. Since this sum was not paid, dues had enhanced to the extent of the amount claimed by the petitioner.

28.1 A reading of the counter claim suggests that the respondent was required to get a no dues certificate from the concerned electricity company i.e., NDPL/BSES. The petitioner it appears did not place anything before the arbitrator to demonstrate that dues more than what were awarded were claimed by the said electricity company. In these circumstances, no

interference is called for with the finding returned by the learned arbitrator with regard to counter claim no.3.

29. Counter claim no.5 preferred by the petitioner and claim no.15 preferred by the respondent relate to litigation cost. These have been dealt together by the arbitrator. He has awarded a sum of Rs.1 Lakh in favour of the respondent. In my opinion, the arbitrator, having found that the petitioner was in breach of the contract - he has rightly rejected the claim for cost in the sum of Rs.1 Lakh by the petitioner and awarded instead a sum of Rs.1 Lakh in favour of the respondent against a sum of Rs.2 Lakh claimed. No interference is called for in respect of the finding returned in this behalf.

30. That brings me to the last part of the award, which is the interest awarded by the learned arbitrator in favour of the respondent under claim No.16. The rate of interest awarded for the pre-reference and pendente lite period is pegged at 10%, while future interest is pegged from the date of award at 12% provided the awarded amount is not paid to the respondent within two months from the date of the award. Interest for the pre-reference and pendente lite period is to commence from the date of invocation of arbitration i.e., 24.07.2007. Ms. Maheshwari did not seriously raise any arguments with respect to the award of interest by the learned arbitrator. In my view, the rate of interest granted is not excessive and therefore, I do not propose to interfere with the interest awarded by the learned arbitrator.

31. Accordingly, claim nos.1, 2, 4, 9, 11, 12, 13, 15 and 16 preferred by the respondent are sustained. Claim nos.3, 5, 6, 7, 8, 10 and 14 allowed by the arbitrator are set aside. The decision of the arbitrator vis-à-vis counter claim nos.1, 3, 4 and 5 is sustained. However, the arbitrator's decision with regard to counter claim no.2 is set aside. The petitioner will be at liberty to seek fresh arbitration with regard to the said counter claim.

32. The petition is disposed of in the aforesaid terms, though parties are left to bear their own cost.

RAJIV SHAKDHER, J

OCTOBER 09, 2013

kk/yg